

ORIGINAL

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In the matter of: :
:
COMPULSORY LICENSE FOR SECONDARY :
:
TRANSMISSIONS BY CABLE SYSTEMS; : CRT Docket 80-3
:
ROYALTY ADJUSTMENT PROCEEDING :
:
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2000 L Street, N.W.
Room 500
Washington, D.C.

Wednesday, December 17, 1980

The hearing in the above-entitled matter commenced
at 10:10 a.m., pursuant to notice,

BEFORE:

CLARENCE L. JAMES, JR., Chairman

THOMAS C. BRENNAN, Commissioner

DOUGLAS E. COULTER, Commissioner

MARY LOU BURG, Commissioner

FRANCES GARCIA, Commissioner

APPEARANCES:

FRITZ ATTAWAY, Attorney-at-Law
Counsel for Copyright Owners

STUART F. FELDSTEIN, Attorney-at-Law
Counsel for NCTA

P R O C E E D I N G S

CHAIRMAN JAMES: The meeting will come to order. The subject before us this morning is C.R.T. Docket No. 80-3, The Cable Adjustment. This meeting is the continuation of a meeting held on December 11, 1980, in which the meeting was recessed to reconvene this morning.

All parties with a personal interest in the subject matter were personally notified of this meeting.

The Chair recognizes Commissioner Coulter.

COMMISSIONER COULTER: This is simply to fill out the decision that we made at the other meeting. We are filling in the figures in response to the proposals submitted by the parties.

As the basis for the adjustment of the cable rate, we have chosen the figure submitted by the copyright owners. January 1, 1980, was selected as the cut-off date. This was to apply the C.P.I., the same span of time for the cable rate adjustment and the gross receipts limitation ceiling. The factor by which we have multiplied the cable rates is 21 percent. This is the whole percentage between the two figures submitted in the copyright owners' proposal. And it is a rounding of the copyright owners' figure.

The gross receipts ceiling limitations have been rounded to nearest thousand dollars. Again we have applied the copyright owners' percentage which is 33.81 percent.

mm-2

1 As a result the rates are changed as follows: The
2 .675 of one percent changed to .817. The .425 of one percent
3 has been changed to .514. The .2 of one percent has been
4 changed to .242. The gross receipts limitation ceiling the
5 figure of \$80,000 has been changed to \$107,000. The figure
6 of \$3,000 has been changed to \$4,000. The figure of \$160,000
7 has been changed to \$214,000.

8 That concludes my remarks, Mr. Chairman.

9 CHAIRMAN JAMES: To set the record straight,
10 Commissioner Coulter was referring to responses that were
11 pursuant to a Tribunal Directive submitted by Counsel for
12 the parties in this proceeding, Fritz Attaway and Stuart
13 Feldstein, on December 15th to all members of the Tribunal.

14 If there are no objections, I will have their
15 responses made a part of the record at this time.

16 (Insert.)
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PROPOSED REGULATIONS

Pursuant to 17 U.S.C. §801(b)(2)(A) and (D), and §804, 37 C.F.R. Chapter III is hereby amended as follows:

By adding a new Part 308, to read as follows:

§308.1 General

§308.2 Royalty Fee for Compulsory License for Secondary Transmission by Cable Systems

§308.1 General

This Part establishes adjusted terms and rates of royalty payments in accordance with the provisions of 17 U.S.C. §111 and 801(b)(2)(A) and (D). Upon compliance with 17 U.S.C. §111 and the terms and rates of this Part, a cable system entity may engage in the activities set forth in 17 U.S.C. §111.

§308.2 Royalty Fee for Compulsory License for Secondary Transmission by Cable Systems

(a) Commencing with the first semiannual accounting period of 1981 and for each semiannual accounting period thereafter, the royalty rates established by 17 U.S.C. §111(d)(2)(B) shall be as follows:

(i) _____ of 1 per centum of such gross receipts for the privilege of further transmitting any nonnetwork programming of a primary transmitter in whole or in part beyond the local service area of such primary transmitter, such amount to be applied against the fee, if any, payable pursuant to paragraphs (ii) through (iv);

(ii) _____ of 1 per centum of such gross receipts for the first distant signal equivalent;

(iii) _____ of 1 per centum of such gross receipts for each of the second, third and fourth distant signal equivalents; and

(iv) _____ of 1 per centum of such gross receipts for the fifth distant signal equivalent and each additional distant signal equivalent thereafter.

(b) Commencing with the first semiannual accounting period of 1981 and for each semiannual accounting period thereafter, the gross receipts limitations established by 17 U.S.C. §111(d)(2) (C) and (D) shall be adjusted as follows:

(i) If the actual gross receipts paid by subscribers to a cable system for the period covered by the statement for the basic service of providing secondary transmissions of primary broadcast transmitters total _____ or less, gross receipts of the cable system for the purpose of this subclause shall be computed by subtracting from such actual gross receipts the amount by which _____ exceeds such actual gross receipts, except that in no case shall a cable system's gross receipts be reduced to less than _____. The royalty fee payable under this subclause shall be 0.5 of 1 per centum regardless of the number of distant signal equivalents, if any; and

(ii) If the actual gross receipts paid by subscribers to a cable system for the period covered by the statement, for the basic service of providing secondary transmissions of primary broadcast transmitters, are more than _____ but less than _____, the royalty fee payable under this subclause shall be (i) 0.5 of 1 per centum of any gross receipts up to _____ and (ii) 1 per centum of any gross receipts in excess of _____ but less than _____, regardless of the number of distant signal equivalents, if any.

ROYALTY FEE ADJUSTMENTS
Submitted by National Cable Television Association

Adjustment of DSE schedule in §111(d)(2)(B)

- | | |
|------------------------------------|--------------|
| 1. CPI increase <u>1/</u> | .3306 |
| less Cable rate increase <u>2/</u> | <u>.1405</u> |
| Difference to be adjusted for | .1901 |
2. Convert this difference from October, 1976 to January, 1980 base ~~so~~^{3/} that it can be applied to current revenues: 3/

$$.1901 / 1.1405 = .1667$$

3. Adjust the rates for each DSE by 16.67% as follows:

0-1 DSE:	.675 x 1.1667 = .7875
2-4 DSE:	.425 x 1.1667 = .4958
5 plus DSE:	.2 x 1.1667 = .2333

Adjustment to gross receipts limitations in §111(d)(2)(C) and (D)

\$3,000	x	1.3306 <u>1/</u>	=	\$3,992
\$80,000	x	1.3306	=	\$106,448
\$160,000	x	1.3306	=	\$212,896

Notes

1/ The CPI was 173.3 at the end of October, 1976, and 230.6 at the end of December, 1979. This represents an increase of 33.06%. Some question could be raised as to whether the December 31, 1979, figure ought to be averaged with the January 31, 1980, figure in order to obtain an allegedly more accurate January 1, 1980 figure. However, the testimony was not entirely clear on this point (see, e.g., Tr. 51, September 30, where Alexander Korn stated that, "It is a toss up . . ."). If some upward adjustment of the December 31 figure is found warranted, then the same would be true of the October, 1976, figure since the date of enactment was two-thirds of the way through that month. NCTA has opted to use the simpler end-of-month figures.

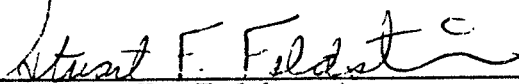
2/ The Tribunal questionnaire and NCTA's Nielsen survey indicated a rate increase of 15.15 and 16% for the October, 1976 to April 1, 1980 time period, respectively. Since the Tribunal's decision established January 1, 1980, as the terminal date, these

percentages must be adjusted. The simplest method is to take the ratio of time elapsed (October 19, 1976 to April 1, 1980 is 41.5 months, and October 19, 1976 to January 1, 1980 is 38.5 months) and apply it to the appropriate rate increase percentage. Conceding the use of the Tribunal figure of 15.15% for DSE-paying systems (C.O.Ex.2), and applying the above time-based methodology, a rate increase figure of 14.05% is arrived at for October, 1976 to January 1, 1980, as follows:

$$\frac{38.5 \text{ months}}{41.5 \text{ months}} = \frac{X\%}{15.15\%}$$

$$X = 14.05\%$$

3/ The raw difference between inflation and the cable rate increase is applicable to 1976 revenues, but the new rates will be applied to current revenues, so the difference must be converted to a 1980 base. See C.O. Exhibit 14 where this calculation was set forth and see the corroborating testimony of Alexander Korn at Tr. 12, September 30 ("Now, were we to apply [the raw difference] to the 1976 revenues, that would be the proper figure, but we know we are going to apply it to 1980 revenues. We have to convert this difference from October, 1976 to [a 1980] base because it will eventually be applied to the 1980 revenues.").


Stuart F. Feldstein
Counsel for National Cable
Television Association

ADJUSTMENT PROPOSALS OF
COPYRIGHT OWNERS

On December 11, 1980, the Copyright Royalty Tribunal adopted a resolution calling for an adjustment of the cable copyright royalty rates established by 17 U.S.C. §111(d)(2)(B) and the gross receipts limitations established by 17 U.S.C. §(d)(2)(C) and (D). The parties were directed to submit proposed regulations and appropriate cost of living data in accordance with the following principles:

1. That inflation shall be measured by the Consumer Price Index (CPI).
2. That the royalty rates shall be adjusted on an industry-wide basis to reflect in the period from October 19, 1976 to January 1, 1980 the difference between inflation and the change in subscriber rates.
3. The gross receipts limitations shall be adjusted by the measure of inflation as of January 1, 1980 from October 1976.

Implementation of these principles requires measurement of two factors for the period October 19, 1976 to January 1, 1980. These are:

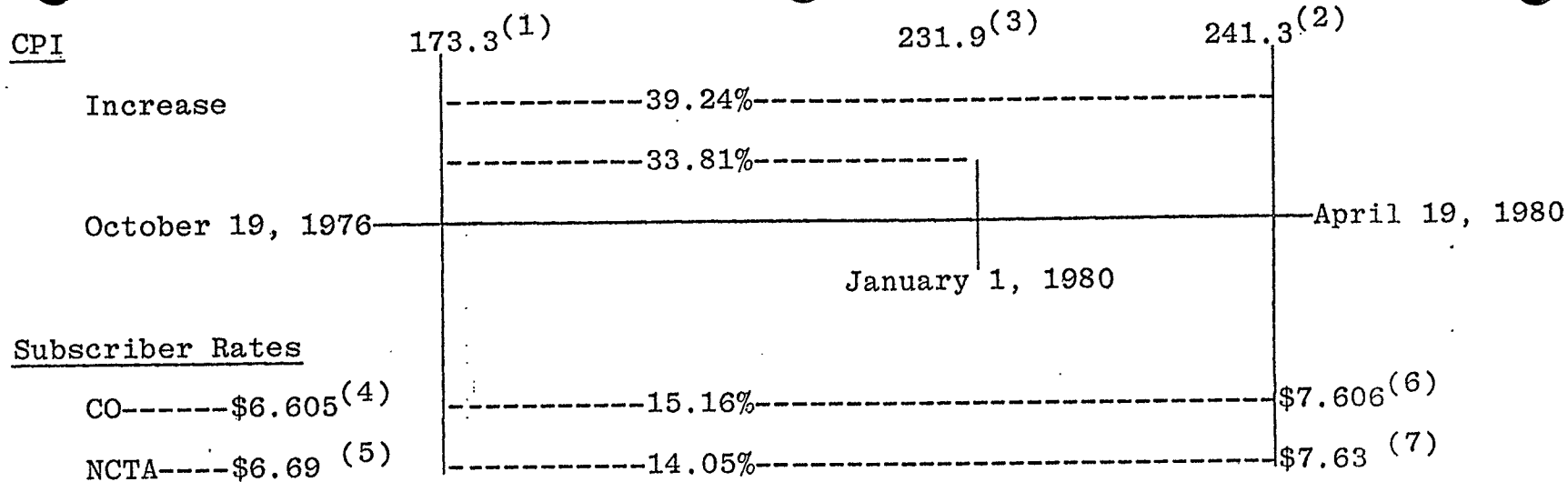
- (a) The change in the CPI, and
- (b) The change in subscriber rates.

The record in this proceeding contains specific information required to measure the change in the CPI during the period in question. However, there is no specific information in the record with respect to average subscriber rates as of January 1, 1980. Thus, the change in subscriber rates between October 19, 1976 and January 1, 1980 cannot be precisely determined from the record.

The cable system survey conducted by the Tribunal and relied upon by the parties, and the exhibits introduced by the parties, reflect the underlying assumption that the relevant period to be measured in this proceeding would end, at the earliest, on April 1, 1980. The Tribunal's statement of principles has invalidated this universally held assumption, thereby requiring that a determination be made on the basis of an inadequate record.

Given this deficiency of the record in light of the Tribunal's statement of principles, the change in subscriber rates during the period ending January 1, 1980 can only be estimated by extrapolation. There are at least two ways to compute this extrapolation, each based upon different assumptions. One way would be to assume that average subscriber rates increased by the same amount each month during the period ending April 1, 1980 for which there is specific data. However, Copyright Owners submit that this assumption is neither fair nor reasonable, and would not reflect actual, true-to-life circumstances.

Copyright Owners submit that the more valid and proper assumption is that subscriber rates increased at an uneven rate -- faster during periods of high inflation, and slower during periods of lower inflation. Thus, Copyright Owners propose an extrapolation based upon this "real world" assumption, and the known information set forth in the chart on the following page.



(1) CO Exhibit 14.

(2) Because the CPI level is reflected as of the middle of the month, an average of March (NCTA Exhibit 2) and April (CO Exhibit 14) has been used to estimate the CPI as of April 1. (See testimony of Robert Crandall, September 30, 1980, page 93.)

(3) Average of December, 1979 (NCTA Economic Studies, Attachment 1, May 19, 1980) and January, 1980 (NCTA Exhibit 2).

(4) CO Exhibit 2. Because this adjustment concerns only "DSE" or "long form" cable systems, the subscriber rate information for these systems only has been used for this calculation.

(5) NCTA Exhibit 7.

(6) CO Exhibit 2.

(7) NCTA Exhibit 7.

Based upon the foregoing information extracted from the record, the subscriber rate increase between October 19, 1976 and January 1, 1980 can be extrapolated by means of the following formula:

The % CPI increase is to the % subscriber rate increase for the period October 19, 1976 to April 1, 1980.

as

The % CPI increase is to the % subscriber rate increase for the period October 19, 1976 to January 1, 1980.

Thus, using the subscriber rate information submitted by Copyright Owners:

$$\frac{39.24}{33.81} = \frac{15.16}{X}$$

$$39.24 X = 512.56$$

X = 13.06 = the estimated subscriber rate, "long form" systems, as of January 1, 1980.

Using the subscriber rate information submitted by NCTA, the calculation would be

$$\frac{39.24}{33.81} = \frac{14.05}{X}$$

$$39.24 X = 475.03$$

$$X = 12.11$$

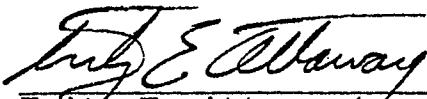
Therefore, the average subscriber rate increase between October 19, 1976 and January 1, 1980 can be estimated by extrapolation to be 13.06% or 12.11% depending upon whether the data from Copyright Owners or NCTA is used. The difference between

inflation and the change in subscriber rates can now be calculated by subtracting these estimated subscriber rate increases from the known CPI increase.

$$33.81 - 13.06 = 20.75 \quad (\text{CO})$$

$$33.81 - 12.11 = 21.70 \quad (\text{NCTA})$$

In light of the foregoing, and consistent with the Tribunal's statement of principles, the royalty rates should be adjusted by an increase of 20.75% or 21.70%, depending upon whether the Tribunal chooses to accept the CO or the NCTA subscriber rate information. The gross receipts limitations should be adjusted by an increase of 33.81%, which equals the percentage increase in the CPI from October, 1976 to January 1, 1980.


Fritz E. Attaway
Counsel for
Copyright Owners

December 15, 1980

mm-3

1 CHAIRMAN JAMES: Is there any discussion or debate?
2 We will take a roll call.

3 Commissioner Brennan?

4 COMMISSIONER BRENNAN: The pending question is on
5 final adoption of the regulations?

6 CHAIRMAN JAMES: That is correct. I thought he was
7 making a motion.

8 COMMISSIONER BRENNAN: I vote yes.

9 COMMISSIONER COULTER: I do make a motion.

10 CHAIRMAN JAMES: Commissioner Brennan?

11 COMMISSIONER BRENNAN: Yes.

12 CHAIRMAN JAMES: Commissioner Coulter?

13 COMMISSIONER COULTER: Yes.

14 CHAIRMAN JAMES: Commissioner Burg?

15 COMMISSIONER BURG: Yes.

16 CHAIRMAN JAMES: Commissioner Garcia?

17 COMMISSIONER GARCIA: Mr. Chairman, I'm sympathetic
18 to the copyrighters' own approach to adjusting the royalty
19 rate of this proceeding on a cable by cable system. The
20 reasons I support this approach is because I basically agree
21 with Mr. Korn in that an industry-wide adjustment could be
22 unfair to the cable systems.

23 If an industry rate adjustment were imposed on all
24 systems it would also apply to systems that had increased
25 their subscriber rates up to or exceeding the inflation rate.

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1 Thus, the subscriber to such systems would not only
2 have to pay the higher subscriber charges but also to share
3 the higher royalty payment which might be passed on to them.

4 Conversely if cable systems did not increase sub-
5 scriber rates or chose to lower rates for certain tier
6 services, packages, they would have to pay only the industry-
7 wide royalty surcharge.

8 I agree with Mr. Korn in that this inequity could
9 be eliminated by a system-by-system royalty rate required by
10 the 1976 Real Constant Royalty Level would be maintained for
11 each individual system. I think in my opinion this Tribunal
12 has been given an opportunity to correct some of the inade-
13 quacies that an industry-wide royalty rate provides.

14 However, I'm going to vote for the proposal as
15 presented by Commissioner Coulter. I want the record to
16 reflect what some of my concerns are.

17 CHAIRMAN JAMES: Commissioner Garcia, your vote is
18 yes.

19 The Chair votes no. There are four yeas and one
20 nay. The regulation is adopted. If there is nothing further
21 to come before this body on this matter--

22 MR. ATTAWAY: Excuse me, Mr. Chairman I have a
23 procedural question. Could you give us some idea when this
24 new regulation will be published and when we might expect
25 your final decision to be printed in the Federal Register?

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1 CHAIRMAN JAMES: I will yield that question to be
2 answered by Commissioner Brennan.

3 COMMISSIONER BRENNAN: Mr. Chairman I have no basis
4 at the present time on which to respond to Mr. Attaway's
5 question other than to say that in the Tribunal's opinion we
6 have by adopting the regulation discharged our responsibilities
7 under the statute and have reached our final decision in this
8 proceeding.

9 MR. ATTAWAY: Thank you.

10 CHAIRMAN JAMES: If there is no further business,
11 the meeting is adjourned.

12 [Whereupon, at 10:20 a.m., the hearing adjourned.]
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ERRATA SHEET

TO

202-726-3801

December 15, 1980

Clarence L. James, Jr., Esq., Chairman
Copyright Royalty Tribunal
1111 20th Street, N.W.
Washington, D.C. 20036

Re: CRT 80-3; Compulsory License
for Secondary Transmissions
by Cable Systems; Royalty
Adjustment Proceeding

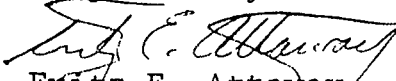
Dear Chairman James:


Pursuant to the Tribunal's directive of December 11, 1980, the undersigned parties hereby submit their joint proposed regulations and their individual calculations for the adjustments to the royalty rates and gross receipts limitations set forth in 17 U.S.C. §111(d)(2)(B), (C) and (D).

The parties wish to make it clear that in submitting this material they are not waiving any rights to seek reconsideration or judicial review of the Tribunal's decision.

Any questions with respect to the foregoing should be directed to the undersigned.

Respectfully submitted,


Fritz E. Attaway
Counsel for Copyright Owners


Stuart F. Feldstein
Counsel for the National Cable
Television Association

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